Supreme Court, U.S.
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No. 94-2017

In The

Supreme Court of the United States

October Term, 1995

SALT LAKE COUNTY and MICHAEL GEORGE,

Petitioners,

v.

J. GARY SHEETS,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Is a diary containing personal and intimate information respecting a person's marriage and family relationships constitutionally protected under the confidentiality branch of the right to privacy from public disclosure by the government when there is no governmental interest to be served by such disclosure?

2. Did the Tenth Circuit Court of Appeals correctly choose Utah Code Ann. § 78-12-25(3) as the appropriate state statute of limitations with respect to claims brought in Utah pursuant to 42 U.S.C. § 1983?

PARTIES

The parties to the instant action are set forth in the caption.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, GARY SHEETS, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners, SALT LAKE COUNTY and MICHAEL GEORGE, which seeks review of the opinion of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The opinion of the Tenth Circuit is reported at 45 F.3d 1383 (10th Cir. 1995) and is reprinted in the Petition at Appendix 1a-14a.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutory provisions relevant to this case are set forth at pages 2-3 of the Petition.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

On October 15, 1985, two bombs exploded in Salt Lake City, killing Steve Christensen, Respondent Gary Sheets' former business associate, and Kathy Sheets, Mr. Sheets' wife. The bombings generated tremendous media interest and public curiosity. App. 2a.

A few weeks after Mrs. Sheets' death, Salt Lake City detectives Jim Bell and Kenneth Farnsworth asked Mr. Sheets for Mrs. Sheets' diary as part of the investigation of her murder. The diary contained personal and intimate information respecting Mr. Sheets' marriage and family

relationships. Believing that the diary would remain confidential, Mr. Sheets voluntarily, but reluctantly, turned the diary over to Detective Bell. Detective Farnsworth gave Mr. Sheets assurances of confidentiality and relayed this message to other investigators. App. 2a.

Copies of the diary were distributed to investigators and detectives assigned to the case, including Petitioner Michael George. Mr. George reviewed the diary, photocopied certain excerpts, and made verbatim notes of its entries for his personal files. The original diary was returned to Mr. Sheets. App. 3a.

In January 1987, when Mark Hofmann pleaded guilty to the murders, the investigation was closed. Salt Lake County's investigative file, including copies of the diary, was then archived. Mr. George retained his personal file. App. 3a.

At the time the murder investigation was concluded, the office of the Salt Lake County Attorney had an unwritten policy that allowed its employees, after an investigation was closed, to disclose to the media any information gathered during the course of an investigation, so long as all media representatives were given equal access. Pursuant to the policy, Mr. George met with three authors writing books about the bombings. One of the authors was Robert Lindsey, a good friend of Mr. George. Mr. George allowed Mr. Lindsey to examine his personal files. Mr. George did not allow the other authors access to his personal files. App. 3a.

There is no evidence in the record that the disclosure of the contents of Mrs. Sheets' diary served any governmental interest. App. 8a.

All three authors published books about the bombings. Mr. Lindsey's book, *A Gathering of Saints*, was the only one to contain verbatim quotations from Mrs. Sheets' diary. App. 3a.

B. COURSE OF THE PROCEEDINGS

On July 31, 1989, Mr. Sheets filed suit against Lindsey and his publisher, claiming an invasion of his privacy arising from publication of Mr. Lindsey's book. On December 5, 1990, Mr. Sheets filed an Amended Complaint to add a claim under 42 U.S.C. § 1983 against Salt Lake County, Mr. George and Salt Lake County Attorney Theodore Cannon for violation of his constitutional right to privacy. App. 16a.

Salt Lake County moved to dismiss Mr. Sheets' § 1983 claims as untimely pursuant to Utah Code Ann. § 78-12-28(3), a two-year statute of limitations specifically targeting § 1983 claims. The District Court denied the motion, rejecting the specific statute of limitations and applying Utah's four-year residual personal injury statute, Utah Code Ann. § 78-12-25(3), in accordance with *Wilson v. Garcia*, 471 U.S. 261 (1985), and *Owens v. Okure*, 488 U.S. 235 (1989). App. 20a.

At the close of Plaintiff's case, Defendants moved to dismiss (in reality a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50[a]), which the court denied. At the close of all the evidence, Defendants moved for judgment as a matter of law, which motion was denied as to Petitioners Salt Lake County and Michael George, but granted as to Mr. Cannon. App. 4a.

The District Court then instructed the jury on the elements of Mr. Sheets' § 1983 claim, giving the following privacy interest instructions, to which Petitioners did not object:

> *Jury Instruction 20:* You are instructed that the United States Constitution protects the interests of individuals in their personal privacy and in avoiding the public disclosure of intimate or personal matters involving home, marriage and family. This right of privacy is a "right . . . secured by the Constitution" for purposes of Section 1983. To prove the second element of his claim, Plaintiff must prove by a preponderance of the evidence that his right to privacy, to avoid public disclosure of intimate or personal matters, was violated.
>
> *Jury Instruction No. 21:* You must decide whether the information contained in the Kathy Sheets diary is of an intimate or personal nature, and whether a reasonable person in Plaintiff's position would expect that the information contained in the Kathy Sheets diary would not be disclosed to the public while that information was in the possession of the Defendants.

Petitioners sought no instruction concerning any governmental interest to be served by disclosure of the diary information.

The jury returned a verdict of $650,000.00 against Salt Lake County and Mr. George. The jury specially found that the information contained in the diary was of an intimate or personal nature; that a reasonable person in Mr. Sheets' position would expect that the information

would not be disclosed to the public while the information was in Petitioners' possession; and that Michael George intentionally disclosed the information in the diary to Robert Lindsey. App. 4a, 6a-10a.

Petitioners filed motions for judgment as a matter of law, for a new trial and for remittitur. The District Court denied the post-trial motions. On Respondent's motion, the District Court awarded him $77,896.93 in attorney's fees. App. 4a.

The Tenth Circuit affirmed and upheld the District Court's application of Utah's four-year residual statute of limitations, Utah Code Ann. § 78-12-25(3). The Tenth Circuit further held that Mr. Sheets had a constitutionally protected privacy interest in avoiding disclosure of personal matters; that the diary information was subject to a reasonable expectation of privacy; that Mr. Sheets legitimately expected the diary to remain confidential; and that there was no compelling state interest in disclosure of the diary's contents. App. 5a-8a.

REASONS FOR DENYING THE PETITION

I. THE SPECIFIC PRIVACY ISSUES PRESENTED BY THIS CASE DO NOT MERIT REVIEW BY THIS COURT.

The Due Process Clause of the Fourteenth Amendment protects individuals from state intrusion on fundamental aspects of personal privacy. *See Roe v. Wade*, 410 U.S. 113, 152-53 (1973). This Court has held that the right to privacy safeguards individuals from government disclosure of personal information. *See Nixon v. Administrator*

of Gen'l Servs., 433 U.S. 425, 457 (1977); *Whalen v. Roe*, 429 U.S. 589, 598-99 & n.24 (1977). While the circuits have wrestled with what information is sufficiently "personal" to warrant constitutional protection, no indication exists that any court in the land would refuse to protect Mr. Sheets' interest in avoiding disclosure of the intimate marital and family information contained in his wife's diary.

A. Petitioners Have Failed to Set Forth Accurately the Decision of the Tenth Circuit Court of Appeals.

Petitioners' effort to portray a conflict between the Tenth Circuit's holding in this case and the decisions of other circuits on the scope of the constitutional right to privacy in the disclosure context hinges largely upon a series of mischaracterizations of the Tenth Circuit's holding in this case.

For example, Petitioners assert:

> The Tenth Circuit . . . found a constitutionally-rooted claim for privacy arises whenever an individual "claims an interest in avoiding disclosure of things personal to him." Petition at 7.

Petitioners then declare:

> As shown by *Sheets* (App. 1a-14a), the Tenth Circuit permits a jury to find a constitutional right based almost entirely on subjective testimony from a plaintiff; if a court is willing to let a jury define a constitutional right with little to guide it but a plaintiff's personal expectation, the contours will surely remain murky and unpredictable. Petition at 11-12.

Building on that inaccurate premise, Petitioners state:

> In the Tenth Circuit, jurors are free to award damages to anyone claiming to have a personal expectation that some information is confidential. Petition at 13.

Petitioners also argue:

> At the extreme, the Tenth Circuit has recognized, for example, a constitutional right of freedom from embarrassment arising from another person's seemingly innocuous writings. Petition at 12.

Petitioners then fashion the following conclusion based on their flawed construction of the opinion:

> Because the issue remains open, the Tenth Circuit has stretched the scope of privacy, virtually obliterating any objectivity in determining what kinds of information should be given constitutional protection against disclosure. The Tenth Circuit transformed Mr. Sheets' expectation into a constitutionally protected right not to be embarrassed. Petition at 18.

A simple reading of the Tenth Circuit's straightforward conclusions and holding readily demonstrates that the opinion does not begin to approach the "murky and unpredictable" contours which Petitioners imagine. The Tenth Circuit ruled:

> Defendants have mischaracterized the issue. Plaintiff does not claim an interest in avoiding disclosure of his deceased wife's general feelings and thoughts, rather he claims an interest in avoiding disclosure of things personal to him, such as his wife's written perceptions of their marriage.

. . .

> Arguably, the information is not extremely sensitive in nature, in other words, the facts revealed in the diary about Mr. Sheets are not particularly controversial or embarrassing. However, **information need not be embarrassing to be personal** and whether it is sufficiently personal to be protected is, in this case, a legitimate question for the jury. We find that information conveyed to one's spouse or that one's spouse has observed about one's character, marriage, finances and business to be personal in nature and subject to a reasonable expectation of privacy. Mrs. Sheets' diary entries about her husband and their marital relationship are certainly as personal as medical and certain financial records, which courts have placed within the ambit of constitutional protection.
>
> The fact that Detective Bell could not recall whether he had initially assured Mr. Sheets of the diary's confidentiality does not negate both Mr. Sheets and Detective Farnsworth's testimony that an understanding of confidentiality did exist. In addition, the very nature of the item – a diary, a place traditionally reserved for the recording of private thoughts – which was given to the police for the specific purpose of aiding their investigation, bolsters Mr. Sheets' claim that he expected the item to remain confidential.

App. at 6a-8a (emphasis supplied).[1]

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[1] The Tenth Circuit's holding affirms the jury instructions, which are consistent with the decisions of this Court in *Paul v. Davis*, 424 U.S. 693 (1976), *Roe v. Wade*, *Whalen*, and *Nixon*. Any

Far from Petitioners' characterization of the Tenth Circuit's holding as a *carte blanche* permitting plaintiffs to avenge hurt feelings, the Tenth Circuit's opinion provides objective standards within constitutional parameters, and consistent with other circuits, for the redress of unwarranted disclosures of legitimately private information. Petitioners' overreaching analysis of the Tenth Circuit's holding simply demonstrates the lack of merit in their argument that the Tenth Circuit's decision is some sort of aberration.

The crux of Petitioners' argument is essentially that the jury found facts with which Petitioners disagree. The Tenth Circuit concluded that there was ample evidence for the jury to reach its verdict. This Court "[does] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Review of the jury's verdict in this case is not warranted as an exercise of the Court's certiorari jurisdiction.

B. No Conflict Exists Among the Circuits Concerning Constitutional Protection of Intimate Information Respecting Marriage and Family Relationships.

Contrary to Petitioners' assertions, no circuit court of appeals "refuse[s] to recognize" the constitutionally protected interest in nondisclosure of personal matters. Analysis of the cases cited by Petitioners reveals merely that

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objection which Petitioners might have had to the instructions was waived by their failure to object to the instructions at trial and by their failure to seek an instruction concerning governmental interest. Fed. R. Civ. P. 51.

two circuits – the Sixth and Eighth – have denied constitutional protection to specific information alleged by the plaintiffs in those cases to be private. However, the circumstances of each of those cases differ sharply from those of the present case.

In the leading Sixth Circuit case, *J.P. v. DeSanti*, 653 F.2d 1080 (6th Cir. 1981), the court found that interagency disclosure of certain juvenile court records was "indistinguishable" from the disclosure permitted in *Paul*. Noting that "the Constitution does not encompass a general right to nondisclosure of private information," the court concluded that the right of privacy should be restricted to the boundaries established by *Paul* and *Roe v. Wade*, *i.e.*, those personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty." 653 F.2d at 1090.

The Sixth Circuit did *not*, however, refuse to recognize the existence of a constitutional right of non-disclosure. To the contrary, it cautioned: "Our opinion does not mean that we attach little significance to the right of privacy, or that there is *no* constitutional right to nondisclosure of private information." 653 F.2d at 1090 (emphasis in original). *See also Doe v. Wigginton*, 21 F.3d 733 (6th Cir. 1994) (rejecting a prisoner's argument that disclosure of his HIV infection to a corrections officer during initial penitentiary processing violated the prisoner's constitutional right to privacy).

The factual bases of *DeSanti* and *Wigginton* are polar opposites of those of the instant case. Both Sixth Circuit cases involve limited dissemination of criminal justice

system records. Neither case involves general public disclosure of a crime victim's diary containing intimate marital and family information.

Petitioners' Eighth Circuit case is *Alexander v. Peffer*, 993 F.2d 1348 (8th Cir. 1993), in which the court denied constitutional protection from disclosure of that plaintiff's unsuccessful attempt to become a police officer. The court found that "[t]he disclosures neither involved matters deemed to be fundamental rights nor addressed highly personal medical or financial information." *Id.* at 1350-51. As with the Sixth Circuit cases, *Alexander's* facts differ to the core from those of this case, which involves both a fundamental right, marital privacy, and other highly personal information.

DeSanti, Wigginton, and *Alexander* have a common denominator: The specific information disclosed in those cases did not implicate any fundamental right. However, both the Sixth and the Eighth Circuits have recognized that marriage and family relationships are "fundamental" in accordance with this Court's decisions.[2] Accordingly,

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[2] *See Cameron v. Seitz*, 38 F.3d 264, 274 (6th Cir. 1994) ("[M]atters relating to marriage and family relationships 'involve privacy rights that are constitutionally protected against unwarranted governmental intrusion' "); *see also McNally v. Pulitzer Publishing Co.*, 532 F.2d 69, 76 (8th Cir. 1976) ("[T]he most intimate phases of personal life have been held to be constitutionally protected."). These cases comport with *Griswold v. State of Connecticut*, 381 U.S. 479, 485 (1965) ("We deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred").

even the Sixth and Eighth Circuits would recognize a right to non-disclosure of information regarding marriage and other intimate human relationships.

Petitioners resort to speculating that Mr. Sheets might have no claim in the Fifth Circuit. However, the Fifth Circuit has consistently recognized a right to freedom from disclosure of intimate matters, either under a pledge of confidentiality, *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981), or when a "legitimate expectation of privacy" exists, *Plante v. Gonzalez*, 575 F.2d 1119, 1135 (5th Cir. 1978). *See also Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985) ("The disclosure strand of the privacy interest . . . includes the right to be free from the government disclosing private facts about its citizens").[3]

The decisions of the Fifth, Sixth and Eighth Circuits are in complete harmony with decisions of the Tenth Circuit concerning the scope of the constitutional right of privacy. For example, the Tenth Circuit has declined to extend constitutional protection to police investigative files relating to police officers' work as officers, *Denver Policemen's Protective Ass'n v. Lichtenstein*, 660 F.2d 432 (10th Cir. 1981); to an internal police report indicating that firefighters had used contraband drugs, *Mangels v. Pena*, 789 F.2d 836 (10th Cir. 1986); and to an expunged record of a plaintiff's conviction for forcible sexual abuse, *Nilson v. Layton City*, 45 F.3d 369 (10th Cir. 1995).

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[3] The *Ramie* court found that "[g]ender and religious beliefs are generally not such intimate matters and are subject to public exposure." *Id.* at 492. The disparity between gender and religious affiliation, on the one hand, and intimate details contained in a marriage partner's diary, on the other, is self-evident.

Mangels provides a succinct analytical framework for the extension of constitutional protection to personal information:

> Information is constitutionally protected when a legitimate expectation exists that it will remain confidential while in the state's possession. *See Nixon v. Administrator of General Services*, 433 U.S. 425, 457-58, 97 S.Ct. 2777, 2797-80, 53 L.Ed.2d 867 (1977) (citation omitted); *Lichtenstein*, 660 F.2d at 435. The legitimacy of an individual's expectations depends, at least in part, upon the intimate or otherwise personal nature of the material which the state possesses. *Id*; *see also United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) (medical records protected). . . . Any disclosed information must itself warrant protection under constitutional standards. *See Paul v. Davis*, 424 U.S. at 713, 96 S.Ct. at 1166.

789 F.2d at 839-40.

Mr. Sheets has never claimed a "general right to nondisclosure." Mr. Sheets claims a specific protected interest in the confidentiality of information respecting his marriage and family relationships. This interest is in perfect accord with *Paul*, which recognized that "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education" are constitutionally protected areas of privacy in the § 1983 context. 424 U.S. at 713. The Tenth Circuit's recognition of a constitutionally protected privacy interest in intimate information concerning Mr. Sheets' marriage and family relationships is likewise consistent with the interpretations of this Court and of all circuits, including the Fifth,

Sixth and Eighth Circuits. Petitioners' perceived conflicts simply do not exist.[4]

C. Petitioners Have Failed to Demonstrate Any Governmental Interest to Justify Disclosure of the Diary Information.

This Court has allowed intrusion into an individual's zone of privacy only after finding that society's interest in disclosure outweighs the privacy interest.

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[4] Petitioners rely on *National Fed'n of Fed. Employees v. Greenberg*, 983 F.2d 286 (D.C. Cir. 1993), to support their conclusion that uncertainty exists among the circuits. Petitioners' quote from *Greenberg*, however, omits the highlighted language set forth below:

> When we return to *Whalen* and look behind the Supreme Court's general remark, quoted above, we find ambiguity. What "individual interests" receive protection from disclosure? Plaintiffs suggest the interest in avoiding humiliation or embarrassment entailed in the disclosure of personal information. What "personal information" and disclosure to whom? To the government as employer or to the world? However one defines the scope of the protection, what are the provisions in the Constitution that are said to confer it? (Citation omitted.) ***We cannot tell from plaintiffs' brief. It refers to nothing more specific than "[t]he Constitution" as the foundation for this constitutional right.*** And what of the government's interest in carrying out its constitutional responsibilities?

Id. at 293 (emphasis supplied).

The omitted language indicates that the court's questions were directed more to defects in the plaintiff's brief than to deficiencies in the law. The defects the court found in *Greenberg* do not exist in the present case; the *Greenberg* questions do not apply.

In *Whalen*, for example, this Court balanced the state's "vital interest in controlling the distribution of dangerous drugs" against "the individual interest in avoiding disclosure of personal matters" and held that a New York statute requiring disclosure of prescriptions for certain drugs was not unconstitutional. 429 U.S. at 598-99.

Similarly, in *Nixon*, this Court determined that the former president's legitimate expectation of privacy in personal records, including diary dictabelts and his wife's personal files, was outweighed by an important public interest in preservation of the overwhelming majority of materials from his presidency in which he had no expectation of privacy. 433 U.S. at 465.

The instant case presents a strikingly different situation. Petitioners have consistently failed to state, let alone establish, ***any*** governmental interest to be served by disclosure of the personal and intimate information contained in Mrs. Sheets' diary. The only possible "interest" served by Petitioners' disclosure of the diary information was satiation of voracious public curiosity about a highly sensational murder – not a governmental interest, but an "interest" better suited to tabloids than to law enforcement agencies. When the District Court pressed Salt Lake County's attorney to identify a governmental interest justifying disclosure of the diary information, counsel was unable to state any such interest, as demonstrated by the following colloquy:

> THE COURT: Assuming it's confidential, assuming that it's confidential, then your argument is the public needs to know confidential material. And the query then becomes why?

> MS. MARLOWE: Because of the notoriety of the crime, public's continuing interest in Mr. Sheets and everything about Mr. Sheets. He never left public – He never left the public's eye. There's a newspaper –
>
> THE COURT: The mere fact that somebody is in the public eye, to use your words, in and of itself doesn't justify the disclosure of confidential information. The mere fact that somebody has some degree of public recognition doesn't mean that an officer who may have confidential material for use in a public function has any basis found in the so-called need to know to disclose it.
>
> MS. MARLOWE: Well, if Mr. Sheets is in a position of public notoriety, okay, then the public has an interest in knowing about him and all things connected with him. I mean, his wife's murdered in his place. There's continuing public interest in Kathy Sheets and her life.
>
> THE COURT: The fact that people have had horrible experience doesn't mean that their life from the beginning of conception until death is to be laid out on the public platform. . . .

App. 39a.

As Petitioners have conceded, all circuit courts considering constitutional privacy claims since *Whalen* have recognized, either explicitly or implicitly, that the government must have *some* kind of interest to justify its disclosure of constitutionally protected information.[5] Salt

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[5] The articulated standards range from a "specific" state interest, *see Alexander*, 993 F.2d at 1350 (8th Cir. 1993), to a

Lake County has no such interest to weigh against Mr. Sheets' privacy interest.

The record is devoid of any evidence to suggest the factual predicate which is indispensable to Petitioners' argument – that is, an articulable governmental interest in disclosure.[6] Because no conceivable justification exists for Petitioners' post-investigation and post-conviction disclosure of intensely personal information, this action is unsuitable for refinement of the scope of the right of privacy in the disclosure context. Certiorari is not merited.

"legitimate" state interest, *see Cinel v. Connick*, 15 F.3d 1338, 1342 (5th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 189 (1994), to a "strong" state interest, *see Fraternal Order of Police Lodge 5 v. Philadelphia*, 812 F.2d 105, 116 (3d Cir. 1987), to a "substantial" state interest, *see Doe v. City of New York*, 15 F.3d 264, 269 (2d Cir. 1994), and finally to a "compelling" state interest, *see Grummett v. Rushen*, 779 F.2d 491, 494 (9th Cir. 1985). While not articulating particular standards, the First Circuit in *Borucki v. Ryan*, 827 F.2d 836, 848 (1st Cir. 1987), and the Sixth Circuit in *DeSanti*, 653 F.2d at 1091, have implicitly acknowledged that the government must have a competing interest in disclosure.

[6] Petitioners not only failed to seek a jury instruction concerning any governmental interest, but also failed to identify any such interest during the course of their appeal to the Tenth Circuit.

II. THE STATUTE OF LIMITATIONS QUESTIONS PRESENTED BY THIS CASE DO NOT MERIT REVIEW BY THIS COURT.

A. The Only Circuit Court Decision Which Arguably Conflicts with the Decision of the Tenth Circuit Has No Continuing Vitality.

Nored v. Blehm, 743 F.2d 1386 (9th Cir. 1984), is the only circuit court case cited by Petitioners which arguably conflicts with the Tenth Circuit's decision not to borrow a state statute of limitations purporting to apply to § 1983 claims.[7] In *Nored*, the Ninth Circuit found that federal courts could appropriately apply an Oregon statute of limitations targeting § 1983.

Nored has no continuing vitality for two distinct reasons. First, *Nored* was decided before this Court's decisions in *Wilson v. Garcia*, which characterized § 1983 actions as involving claims for personal injuries, and *Owens v. Okure*, which held that where a state has one or more statutes of limitations for enumerated intentional torts and a residual statute for all other personal injury actions, the residual statute applies.[8] *Wilson* and *Owens* clearly set forth criteria for selection of appropriate state

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[7] Other circuit courts have declined to borrow state statutes of limitations specifically applicable to § 1983 actions. *See, e.g., Hughes v. Sheriff of Fall River County Jail*, 814 F.2d 532, 535 (8th Cir. 1987); *Johnson v. Davis*, 582 F.2d 1316, 1318-19 (4th Cir. 1978).

[8] Interestingly, in its catalogue of state statutes which might be applicable to § 1983 claims, the *Owens* court did not even list Utah Code Ann. § 78-12-28(3), the precise statute upon which Petitioners rely. 488 U.S. at 247, n. 8

statutes of limitations applicable to § 1983 claims and eliminate any potential confusion engendered by *Nored*.

Second, since the *Nored* decision, the language in the Oregon statute referring specifically to § 1983 claims has been deleted. *See* Or. Rev. Stat. § 30.265(1). The Ninth Circuit, following *Wilson*, has subsequently held that Oregon's statute of limitations for personal injury actions applies to actions under § 1983. *Cooper v. City of Ashland*, 871 F.2d 104, 105 (9th Cir. 1989).

Petitioners' own argument demonstrates that the law is settled, and consistent, in other jurisdictions. Following *Wilson* and *Owens*, courts have routinely adopted state general and residual personal injury statutes as the "most analogous" state statutes applicable to § 1983 claims – exactly as the Tenth Circuit has done in the instant case.

The Utah statute of limitations rejected by the Tenth Circuit is currently the only state limitation period that specifically targets § 1983 claims. *See Arnold v. Duchesne County*, 26 F.3d 982, 985 (10th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 721 (1995); *Adamson v. Provo*, 819 F. Supp. 934, 943, n. 11 (D. Utah 1993). Because this Court has addressed the issue, and because the law is settled among the circuits, it is unlikely that the issue of a state's power to adopt statutes of limitation targeting only § 1983 claims will recur. Certiorari is therefore inappropriate.

B. The Tenth Circuit Correctly Held That Utah Code Ann. § 78-12-25(3) is the Most Appropriate Utah Statute of Limitations with Respect to § 1983 Claims.

In *Mismash v. Murray City*, 730 F.2d 1366, 1367 (10th Cir. 1984), the Tenth Circuit held that all § 1983 claims brought in federal court in Utah were subject to the four-year limitations period provided in Utah Code Ann. § 78-12-25(3).

Apparently in response to that decision, the Utah legislature adopted Utah Code Ann. § 78-12-28(3), which prescribes a two-year limitation for § 1983 claims. During the Utah Senate debate, Sen. Lyle Hillyard commented that a two-year, rather than four-year statute should be adopted because of the "proliferation" of § 1983 lawsuits, "especially in our prisons." Floor Debate, 47th Utah Leg., Gen. Sess. (Jan 16, 1987) (statements of Sen. Lyle Hillyard) (Senate Recording No. 1, Side 1). It is reasonable to conclude, as the Tenth Circuit did in *Arnold*, that the purpose of the statute was simply to reduce the number of such lawsuits, a purpose contradictory to section 1983's broad remedial objectives. *Arnold*, 26 F.3d at 988.[9]

Petitioners argue that, since other circuits have borrowed one- and two-year *residual* or *general* personal injury statutes of limitations, the Tenth Circuit's adoption of Utah's longer four-year statute creates "anomalous

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[9] *See also Burnett v. Grattan*, 468 U.S. 42, 55 (1984) (The "policy of protecting public officers 'from the seemingly endless stream of unfounded, and often stale, lawsuits brought against them' is 'manifestly inconsistent with the central objective of the Reconstructive-Era civil rights statutes' ").

results." However, Petitioners fail to acknowledge that the problem with the specific Utah statute is not that the limitations period is too short, but rather that the limitations period is shorter than those accorded to other civil rights claims – thus discriminating against an important federal right.

The fallacy of Petitioners' argument was exposed in *Adamson*:

> By targeting section 1983, Utah's two-year statute of limitations expressly protects the state of Utah, and its employees, from the type of civil rights claims most likely to be brought against them. Other federal civil rights claims, frequently filed against private citizens, received no such reduced limitations period from the Utah Legislature. Such disparate treatment manifests a specific legislative intent to curtail section 1983 claims by shortening the period in which such a claim may be brought, thereby minimizing governmental liability. This constitutes an impermissible constraint by the State of Utah on a uniquely federal remedy.

819 F.Supp. at 945. *See also Arnold*, 26 F.3d at 988.

Guided by this Court's decisions in *Wilson* and *Owens*, the Tenth Circuit in the instant case correctly chose Utah Code Ann. § 78-12-25(3) as the most appropriate Utah statute of limitations with respect to § 1983 actions.

Petitioners argue as a parting shot that the Tenth Circuit has "intrude[d] into the states' internal management and into their power." Petition at 21. This Court aptly disposed of Petitioners' argument in *Wilson*:

> [Section 1988] is designed to assure that neutral rules of decision will be available to enforce the civil rights actions, among them § 1983. Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action.

471 U.S. at 269.

As noted by the *Arnold* court, "neither Congress nor the Supreme Court has authorized states to create limitations periods specifically and exclusively applicable to section 1983 actions." 26 F.3d at 989. In this case, the Tenth Circuit correctly rejected Utah's discriminatory statute in favor of a statute in harmony with the decisions of this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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